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No. 672

In the Supreme Court of the United States

OCTOBER TERM, 1958

AURELIO ZACARIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 14-17) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1958. A petition for rehearing was denied on January 5, 1958. The petition for a writ of certiorari was filed on January 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order denying a motion to suppress, made after complaint but before indictment, as to narcotics which could not be subject to an order for

return, was properly held not to be final and therefore not appealable.

RULE INVOLVED

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioner seeks review of the order of the Court of Appeals for the Fifth Circuit, dismissing his appeal from an order of the District Court for the Western District of Texas, denying his motion to suppress as evidence narcotics taken from his person on July 26, 1958.

The motion to suppress was filed on August 26, 1958, after complaint and preliminary hearing (R. 1-3, 15), but before indictment. The evidence showed that Forbey, a customs agent (who was not called by petitioner) received information from an informant that petitioner, identified as "Zach," was selling about $4,000 worth of heroin (R. 51-52, 56, 57-58). Other agents were assigned to survey a tourist court where, according to the information relayed to those agents, a sale was to be made (R. 20-21, 56). When the agents started their survey at about 9 o'clock on the morning of July 26, they were given a description of petitioner and a description of his automobile and its license number (R. 22, 43). It was not known at that time who would make the actual delivery at the tourist court (R. 26-27, 55). At about 1:45 p.m., information was conveyed to the surveilling agents by radio that petitioner would be making the delivery in person (R. 34, 37-38, 41-42). At about 2 o'clock petitioner drove his car into the court. As he got out, he was stopped by two agents and searched. Heroin was discovered on his person (R. 23-24, 46).

The district court denied the motion to suppress on September 4, 1958 (R. 79). Petitioner's appeal was dismissed on the ground that, even though no indictment had been returned, the order on the motion, made

after complaint and preliminary hearing and after petitioner had been held for the grand jury, was in the criminal case and not a final order (Pet. App. 14-18). On October 7, 1958, indictments were returned against petitioner charging concealment of heroin on July 26, 1958.

ARGUMENT

The actual holding of the court below on the facts of this case is that an order on a motion to suppress, which does not seek the return of any property, and which, although brought before indictment, was brought after preliminary hearing and a binding over for the grand jury on a charge relating to the evidence at issue, is an order in the criminal case and not appealable by the moving party.[1] As we develop below, petitioner is correct in his assertion that the holding conflicts with decisions in at least one other circuit. The conflict is not, however, as great as petitioner would make it appear nor is the ruling contrary to decisions of this Court since many of the cases cited by petitioner are distinguishable. In view of the recent decisions of this Court in this field we doubt that the conflict, which is with earlier decisions, is one that requires resolution at this time and in this case.

1. This Court has held that actions or motions for the *return of property*, made before indictment (even if they also seek incidental relief of suppression), are independent proceedings so that an order therein is

[1] In narcotics cases, the government has a special right to appeal from an order granting a motion to suppress, whether made before or after indictment, so long as jeopardy has not attached (18 U.S.C. (Supp. V) 1404).

appealable by either side. *Perlman* v. *United States*, 247 U.S. 7. This was applied to a motion for return of papers during the pendency of a hearing on a complaint before a commissioner in *Go-Bart Importing Company* v. *United States*, 282 U.S. 344. These cases have, however, the distinguishing feature that the motion at issue sought, not merely the suppression of evidence, but immediate return of property of the moving party, so that there was an independent equitable basis for the action regardless of what happened in the criminal proceedings. The same distinction applies to a number of Court of Appeals decisions cited by petitioner as being in conflict with the decision below, including *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9), mentioned in the opinion below as reflecting a different view from that taken in this case. See *Hoffritz* v. *United States*, 240 F. 2d 109 (C.A. 9); see also *In re Sana Laboratories*, 115 F. 2d 717 (C.A. 3), certiorari denied, 312 U.S. 688; *United States* v. *Bianco*, 189 F. 2d 716, 717 (C.A. 3); *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2), where orders in proceedings brought after preliminary hearing but before indictment, but granted after indictment, were held appealable.[2] In this case, because the property seized is contraband there is no property which petitioner can get back.

There are other cases cited by petitioner as in conflict with the decision below which, while they involved only a motion to suppress evidence and not the return of property, were brought in anticipation of an indictment, but before there had been a preliminary

[2] Contra: *Nelson* v. *United States*, 208 F. 2d 505 (C.A.D.C.), certiorari denied, 346 U.S. 827; see also *United States* v. *Williams*, 227 F. 2d 149 (C.A. 4).

hearing on a specific charge. *Lapides* v. *United States*, 215 F. 2d 253 (C.A. 2); *Centracchio* v. *Garrity*, 198 F. 2d 382 (C.A. 1), certiorari denied, 344 U.S. 866. The court below had itself previously held that such an order was appealable, *White* v. *United States*, 194 F. 2d 215 (C.A. 5), certiorari denied, 343 U.S. 930; see also *Foley* v. *United States*, 64 F. 2d 1 (C.A. 5). These cases are not in conflict with the decision below since that decision rests on the proposition that the complaint before the commissioner and the binding over to the grand jury were the start of a specific criminal proceeding to which the order on the motion to suppress should be related.[3]

The actual holding below is in direct conflict only with decisions in the Second Circuit:—*In re Fried*, 161 F. 2d 453 (C.A. 2),[4] involving a motion to suppress a statement, and *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2), involving a motion to suppress narcotics (which of course were not returnable). In both those cases, as here, although no indictment had been returned, there seems to have been a preliminary hearing on the charge to which the evidence sought to be suppressed related, but the orders denying the motions to suppress were held appealable. Language in *United*

[3] It is also possible to distinguish most of those cases on the ground that they involved statements concerning tax liability so that the order could have effect on civil as well as criminal liability.

[4] The government filed a petition for a writ of certiorari in that case to review the holding that a mere statement, as distinguished from tangible property, was subject to a motion to suppress before trial. The petition was granted (331 U.S. 804) but was withdrawn (332 U.S. 807) for reasons unconnected with the legal merits of the ruling. The government remains of the view that the holding was erroneous and tends to delay prosecution, but the problem has not proved to be serious since the number of such motions brought has proved to be far less than anticipated.

States v. *Sinciro*, 190 F. 2d 397 (C.A. 3), is also contrary to that in the instant case, although in that case there is a separate ground for treating the motion to suppress as an independent proceeding since the criminal prosecution would be brought in a district other than that where the motion was made. Language in *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9), and *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2), as distinct from the actual holdings, is likewise contrary to that in the opinion below.

On the other hand, although, as petitioner states, *United States* v. *Williams*, 227 F. 2d 149 (C.A. 4), is distinguishable from the instant case because there an indictment had been returned before the order was entered, rather than pending appeal, the language of that opinion is in accord with that of the decision below in referring to a complaint and preliminary hearing as the start of a criminal prosecution. And *Nelson* v. *United States*, 208 F. 2d 505 (C.A. D.C.), certiorari denied, 346 U.S. 827, is in accord with the decision below in not treating the time of bringing the motion as conclusive.[5] The decision below seems to be the only one of its kind holding directly that an order on a motion to suppress and no more, both made and granted after complaint but before any indictment, is not appealable.

[5] If, on return of the indictment, the motion to suppress merges into the criminal case, as *Williams* and *Nelson* seem to suggest, then this case has become moot by reason of the return of the indictment against petitioner. However, we believe that, if the proceeding was an independent one when brought, it remains so for the purpose of appeal even if an indictment is subsequently returned. The Second and Ninth Circuits so hold. *Lapides* v. *United States*, 215 F. 2d 253 (C.A. 2); *Hoffritz* v. *United States*, 240 F. 2d 109 (C.A. 9). This is in accord with their view that the order is appealable whenever the motion to suppress is made before indictment, but is not necessarily dependent on that view.

2. Despite the conflict in decision discussed above, we doubt the necessity of resolution of the issue at this time and in this case. All the decisions relied upon by petitioner were rendered prior to the decision of this Court in *Carroll* v. *United States*, 354 U.S. 394, and those in direct conflict with the decision below were rendered before the decision in *United States* v. *Wallace Co.*, 336 U.S. 793. It is true that, in the *Carroll* case, the Court recognized the earlier cases relied upon by petitioner, saying (354 U.S. at pp. 403-404):

> Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment*, or in a *different district* from that in which the trial will occur, or *after dismissal* of the case, or perhaps where the emphasis is on the *return of property* rather than its suppression as evidence. In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision.

However, since the problem before the Court in the *Carroll* case (the right of the government to appeal from an order granting a motion to suppress brought after indictment) was different from that here involved, the Court had no occasion to consider the particular refinement to which the decision below relates, *i.e.*, whether a motion merely to suppress evidence, after preliminary hearing and before indictment, is part of the criminal case. The reason that we think the conflict on the present issue may not presently be of any importance is that both *Carroll* and *Wallace* seem

to us to have rendered outmoded any mechanical test of appealability which rests solely on the question of whether the motion is made before or after indictment. The *Carroll* case recognized, as *Cogen* v. *United States*, 278 U.S. 221, 225, had stated, and the *Wallace* case, 336 U.S. at pp. 801-803, had emphasized, that the " 'essential character and the circumstances under which it is made' determine whether a motion is an independent proceeding or merely a step in the criminal case." 354 U.S. at p. 404, fn. 17. The ruling here seems to us an application of that principle to these particular facts. The evidence to which the motion to suppress related, the narcotics taken from petitioner's person, was the basis of the charge on which the preliminary hearing was held, and the reason that petitioner was bound over for grand jury action. The motion to suppress had no purpose other than in connection with that criminal prosecution. There was no property which petitioner could get back, no indirect consequences beyond the criminal prosecution to which he would be subjected.[6] The admission of the evidence will be subject to review on appeal in the criminal case if a conviction is had. Under these circumstances, the court could properly find, in accord with the policy against piecemeal appeals, that the motion was so directly related to the criminal case as to be a part thereof.

As the paucity of cases illustrates, the situation here

[6] As already noted, in cases involving statements given to officers of the Internal Revenue Service, such as were involved in *Lapides* v. *United States*, 215 F. 2d 253 (C.A. 2), and *Centracchio* v. *Garrity*, 198 F. 2d 382 (C.A. 1), certiorari denied, 344 U.S. 866, there is prospective civil tax liability as well as prospective criminal prosecution. This may well serve to distinguish such cases from that involved here where the motion to suppress has no purpose beyond the criminal prosecution.

presented—a motion to suppress before indictment which serves no purpose beyond the attempt to prevent use of the evidence in a criminal prosecution—is not frequent. We suggest, therefore, that this narrow question of appealability can well be deferred by this Court pending possible consideration thereof in other circuits in the light of the decisions in *Wallace* and *Carroll*.[7] In this case there is no occasion for such review. The lack of merit in petitioner's attack upon the validity of the search is demonstrated by this Court's recent decision in *Draper* v. *United States*, No. 136, decided January 26, 1959. There is no reason for further delay.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] The ruling of the Fourth Circuit in *United States* v. *Williams*, 227 F. 2d 149, in 1955 was, as the opinion shows, deemed to be a particular application of the rule of the *Wallace* case. That circuit in a different setting considered the granting of a motion to suppress as appealable even after indictment. *United States* v. *Ponder*, 238 F. 2d 825 (C.A. 4).

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